No. 2681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City and County of San Francisco, California, SOPHIE SUTER, SOPHIE SUTER, as Executrix of the Will of Daniel Suter, Deceased, and OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (otherwise Kruger), Deceased,

Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

EDWARD C. HARRISON,
MAURICE E. HARRISON,
Solicitors for Appellants.

Filed this ..... day of November, 1916.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

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APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

The appellants in the above entitled cause respectfully submit for consideration a few words only, in answer to the petition for rehearing presented herein on behalf of the appellee.

If anything can be found in the petition for rehearing that merits consideration for a moment, it

is the suggestion therein contained to the effect that the court has, in its decision of the appeal, overlooked the fact, now claimed to exist, that no appeal was taken from the decree of foreclosure.

The petition says, on its page six, that "the Honorable Judge's summary regarding what took place is absolutely wrong," because on page five of the decision it is set forth as a fact that Krueger consulted his attorney, etc., about appealing. And it is further stated on the same page of the petition that "the learned Judge has been led into this error by wilful misstatement, &c."

But the opinion does not set forth as a fact that Krueger consulted his attorney; the language of the opinion is:

> "Defendant in that suit (Krueger) then called the attorney who had looked after Krueger's interests in the foreclosure suit, and he testified that after decree of foreclosure had been rendered in the foreclosure suit, Krueger consulted him about appealing; that this was about five or six weeks before expiration of the time to take an appeal expired; that on May 20, 1904, he obtained an order, etc."

On pages 80, 81, 84 and 85 of the record will be found the sworn testimony of Warner Temple, the writer of the petition for rehearing, which testimony is precisely as stated in the language of the decision, and precisely also as stated in the affidavit of Edward C. Harrison, the writer of this answer, so viciously attacked in the petition for rehearing. Neither the writer hereof nor the learned writer

of the opinion can say whether Warner Temple testified truly under oath on the trial of the ejectment case, the judgment of which is attacked in this cause, or in this case, when his recollection is not so fresh; but there can be no question that he did testify in the ejectment cases, and in the manner recited in the decision. The record so shows, and counsel does not pretend to contradict the record in this respect. All that it is necessary to know, and all that is known concerning this testimony is that when the judgment under attack was rendered and entered under the compromise made on the facts as they stood at the time, all that the court and the parties had before them was the aforesaid sworn testimony of Warner Temple, which he had not yet then contradicted under oath and which was then properly presumed to be true. It can hardly be made the basis of counsel's attack upon the testimony for appellants in this case, or the decision rendered on this appeal, that the former truly states, and the latter truly recites, his own sworn testimony as the record shows it, notwithstanding his present tardy contradiction of the facts shown by such former testimony.

There is nothing else in the petition for rehearing that seems to appellants' counsel to require attention, and with apologies for troubling the court with even this short answer, it is respectfully submitted on their behalf that the decision rendered is pre-eminently just, and the only possible one in the

case, and that the petition for rehearing should be denied.

Dated, San Francisco,
November 11, 1916.

Respectfully submitted,

EDWARD C. HARRISON,
MAURICE E. HARRISON,
Solicitors for Appellants.